Supreme Court, U.S.
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In The

Supreme Court of the United States

WALTER C. MORGAN,

Petitioner,

v.

UNITED STATES DISTRICT COURT,
CENTRAL DISTRICT OF CALIFORNIA,

Respondent,

UNITED STATES OF AMERICA,

Real Party In Interest.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether or not the petition for a writ of mandamus should have been granted because the federal court lacks jurisdiction over this case because Congress lacks the power to tax firearm parts, and specifically unattached firearm barrels and firearm frames-receivers without barrels, under the control of a person, pursuant to Title 26 U.S.C. § 5861(d)?

2. Whether or not the petition for a writ of mandamus should have been granted because the evidence seized at Dr. Morgan's residence should be suppressed and the indictment dismissed because the information provided to the magistrate judge was stale and could not under any authority establish probable cause?

3. Whether or not the petition for a writ of mandamus should have been granted because a felony conviction under 28 U.S.C. § 5861(d) violates the Eighth Amendment because the underlying conduct is failure to pay $200.00 Federal Tax on a firearm which is also punishable by a lien on or a seizure of property, or a misdemeanor?

4. Whether or not the petition for a writ of mandamus should have been granted because petitioner will be damaged and prejudiced in a way not correctable on appeal?

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PETITION FOR WRIT OF CERTIORARI

The petitioner Walter C. Morgan respectfully prays that a writ of certiorari issue to review the United States Court of Appeals for the Ninth Circuit's decision denying his petition for a writ of mandamus.

OPINION BELOW

On February 14, 2005, the United States Court of Appeals for the Ninth Circuit filed its Order in *In re: Walter C. Morgan*, CA 04-76721, denying the petition for a writ of mandamus. A copy of the Order is attached hereto as Appendix "1". (App. "1".) The Ninth Circuit denied the motion for reconsideration on March 17, 2005. A copy of that Order is attached as Appendix "3". (App. "3".) The district court's Order denying motion to quash the search warrant and set aside indictment was issued on August 25, 2004. This order is attached as Appendix "2". (App. "2".)

JURISDICTION

On February 14, 2005, the United States Court of Appeals for the Ninth Circuit issued its Order denying the petition for a writ of mandamus. (App. "1".) On March 17, 2005, the Ninth Circuit denied the motion for reconsideration. (App. "3".) Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED IN THIS CASE

Title 26 U.S.C. § 5861(d):

It shall be unlawful for any person –

(d) to receive or possess a firearm which is not registered to him in the National Firearms Registration and Transfer Record;

Title 26 U.S.C. § 5845(a):

For the purpose of this chapter [26 USCS §§ 5801 et seq.] –

(a) Firearm. The term 'firearm' means (1) a shotgun having a barrel or barrels of less than 18 inches in length; (2) a weapon made from a shotgun if such weapon as modified has an overall length of less than 26 inches or a barrel or barrels of less than 18 inches in length; (3) a rifle having a barrel or barrels of less than 16 inches in length; (4) a weapon made from a rifle if such weapon as modified has an overall length of less than 26 inches or a barrel or barrels of less than 16 inches in length; (5) any other weapon, as defined in subsection (e); (6) a machinegun; (7) any silencer (as defined in section 921 of title 18, United States Code); and (8) a destructive device. The term 'firearm' shall not include an antique firearm or any device (other than a machinegun or destructive device) which, although designed as a weapon, the Secretary finds by reason of the date of its manufacture, value, design, and other characteristics is primarily a collector's item and is not likely to be used as a weapon.

Title 26 U.S.C. § 5821:

5821. Making tax.

(a) Rate. There shall be levied, collected, and paid upon the making of a firearm a tax at the rate of $ 200 for each firearm made.

(b) By whom paid. The tax imposed by subsection (a) of this section shall be paid by the person making the firearm.

(c) Payment. The tax imposed by subsection (a) of this section shall be payable by the stamp prescribed for payment by the Secretary.

Title 26 U.S.C. § 5846:

§ 5846. Other laws applicable.

All provisions of law relating to special taxes imposed by chapter 51 [26 USCS §§ 5001 et seq.] and to engraving, issuance, sale, accountability, cancellation, and distribution of stamps for tax payment shall, insofar as not inconsistent with the provisions of this chapter [26 USCS §§ 5801 et seq.], be applicable with respect to the taxes imposed by sections 5801, 5811, and 5821 [26 USCS §§ 5801, 5811, and 5821].

Title 26 U.S.C. 6332(a):

§ 6332. Surrender of property subject to levy.

(a) Requirement. Except as otherwise provided in this section, any person in possession of (or obligated with respect to) property or rights to property subject to levy upon which a levy has been made shall, upon demand of the Secretary, surrender such property or rights (or discharge such obligation) to the Secretary, except such part of the property or rights as is, at the time of such demand, subject to an attachment or execution under any judicial process.

Title 26 U.S.C. 7809:

Deposit of collections.

(a) General rule. Except as provided in subsections (b) and (c) and in sections 6306, 7651, 7652, 7654, and 7810 [26 USCS §§ 6306, 7651, 7652, 7654, and 7810], the gross amount of all taxes and revenues received under the provisions of this title, and collections of whatever nature received or collected by authority of any internal revenue law, shall be paid daily into the Treasury of the United States under instructions of the Secretary as internal revenue collections, by the officer or employee receiving or collecting the same, without any abatement or deduction on account of salary, compensation, fees, costs, charges, expenses, or claims of any description. A certificate of such payment, stating the name of the depositor and the specific account on which the deposit was made, signed by the Treasurer of the United States, designated depositary, or proper officer of a deposit bank, shall be transmitted to the Secretary.

STATEMENT OF THE CASE

Petitioner was indicted in June 2003. The Indictment charged Petitioner with knowingly possessing firearms that were not registered to him in the National Firearms Registration and Transfer Record. Petitioner pled not guilty. He subsequently moved to set aside the indictment and challenged the legality of the search warrant. On August 25, 2004, the district court denied petitioner's motion to quash the search warrant and set aside the indictment. (App. "2".)

Petitioner filed a Petition for Writ of Mandamus pursuant to Federal Rules of Appellate Procedure, rule 21 in the United States Court of Appeals for the Ninth Circuit. The Ninth Circuit denied the petition on February 14, 2005 and denied the motion for reconsideration on March 17, 2005. (App. "1" and App. "3".) The parties have stipulated to a continuance of the trial until resolution of this petition.

STATEMENT OF THE FACTS

On March 7, 2002, a federal search warrant was executed by ATF agents at a company called Cole Distributing in the state of Kentucky. During this search agents allegedly found machineguns. Cole Distributing had allegedly been selling machineguns to the public over the Internet as "parts kits". Agents also found business records revealing that Cole Distributing sold over 400 of these "parts kits" to individuals residing through the United States. Cole Distributing's business records showed that petitioner Walter Morgan allegedly received shipments from Cole Distributing at his residence in Riverside, California, on July 27, 2001, August 7, 2001, and August 10, 2001. (Exhibit "A" pp. 61-63.)[1]

In May 2002, an ATF agent in Kentucky contacted Christopher R. Curran, an ATF agent in California and requested that he investigate Dr. Morgan. (Exhibit "A", p.

[1] The Exhibits referenced herein are Exhibits attached to the Petition for a Writ of Mandamus filed in the Ninth Circuit. Petitioner includes reference to the Exhibits for the Court's convenience should the Court request the record in this case.

61.) On June 27, 2002, ten months after Dr. Morgan allegedly received shipments from Cole Distributing, Agent Curran sought and obtained a warrant to search Dr. Morgan's home in Riverside. (Exhibit "A", p. 57.) Agent Curran's affidavit in support of the search warrant did not state any evidence that Dr. Morgan was suspected of any wrongdoing during the previous ten months. The affidavit merely stated that Dr. Morgan received three shipments from Cole Distributing ten months prior. (Exhibit "A" pp. 57-66.)

On July 2, 2002, Agent Curran served the search warrant at Dr. Morgan's home in Riverside and allegedly found the two firearms (not related to the shipments from Cole Distributing) that formed the basis the Indictment returned the following year in June 2003. (Exhibit "A", pp. 67-68.) The Indictment charged Dr. Morgan with Title 26 United States Code section 5861(d), knowing possession of firearms not registered in the National Firearms Registration and Transfer Record. (Exhibit "B", pp. 69-70.)

Dr. Morgan filed a motion to quash the search warrant and set aside the indictment. After a hearing on the motion to quash the search warrant and to set aside the indictment, the district court denied Dr. Morgan's motion. (Exhibit "C", pp. 71-81, Exhibit "F", pp. 100-110.) The Ninth Circuit denied petitioner's petition for a writ of mandamus and motion for reconsideration. (App. "1" and App. "2".)

REASONS FOR GRANTING THE WRIT

Dr. Walter Morgan has been practicing medicine for twenty-three years and is currently the Residency Director

for the Family Medicine Residency Program at Kaiser Permanente Medical Center Riverside, California, a position he has held for 15 years. Dr. Morgan also currently holds academic appointments as Assistant Clinical Professor at the USC School of Medicine, Assistant Clinical Professor at the Loma Linda University School of Medicine, and he also lectures in the medical community locally and nationally.

During the summer of 2001, Dr. Morgan ordered over the Internet "parts kits" containing pieces of metal cut from destroyed machineguns from a company in Kentucky called Cole Distributing. These metal pieces are a legal product. With intricate and specialized procedures by an expert, these pieces can be transformed into a firearm. Dr. Morgan does not possess this knowledge. Nearly one year later, agents obtained a warrant to search Dr. Morgan's residence. During this search, agents claimed to have found two unregistered firearms. These two firearms formed the basis of the charges in the Indictment pursuant to Title 26 U.S.C. § 5861(d).

Dr. Morgan seeks this petition for a writ of certiorari because the district court lacks jurisdiction over this case as gun parts and semi-automatic firearm receivers without barrels attached are not required to be registered under federal law (Title 26 U.S.C., The National Firearms Act). Furthermore, Dr. Morgan seeks this petition for a writ of certiorari because the offense involves conduct that can also be by statute penalized by a lien on, or a seizure of property or a misdemeanor, and the federal sentencing guideline range for the charged offense in Dr. Morgan's indictment is 27 to 33 months. The federal prison sentence of 27 to 33 months for identical conduct that can be also

punished by a lien on or seizure of property or a misdemeanor is unconstitutional under the Eighth Amendment.

Furthermore, based on United States Supreme Court law, Ninth Circuit law, and other circuit law, the search warrant issued to search Dr. Morgan's residence was stale and could not under any authority establish probable cause. The agent affidavit stated that nearly one year prior, UPS records showed that packages from Cole Distributing were delivered at Dr. Morgan's residence during the summer of 2001. Without more, this information could not provide a substantial basis to infer that any item from those packages sent to Dr. Morgan's residence during the summer of 2001, could be on the premises during the summer of 2002 and that there was any illegal activity at Dr. Morgan's residence. Furthermore, because the affidavit was lacking in probable cause, Agent Curran could not have reasonably relied on the warrant. Dr. Morgan argued in the Ninth Circuit that the petition for writ of mandamus should be granted because the court refused to be guided by unambiguous provisions of settled common law doctrine. *American Fidelity Insurance Company v. United States District Court*, 583 F. 2d 1371, 1374 (9th Cir. 1976).

Additionally, Dr. Morgan will be damaged in a way not correctable on appeal because even if his conviction were reversed on appeal, Dr. Morgan would have his personal and professional reputation irreparably damaged in his professional community. The Medical Board of the State of California would likely summarily revoke his license upon conviction of a felony, the charged violation of Title 26 U.S.C. § 5861(d). Less likely the Medical Board could extensively investigate his license, place him on probation or restriction, and then he would lose his medical license. As all of this information would be in the public domain

(see Medical Board web site), Dr. Morgan would lose his ability to care for his patients, lose their confidence forever, and be professionally destroyed. *Bauman v. United States District Court*, 557 F. 2d 650, 653 (9th Cir. 1977).

ARGUMENT

A. THE PETITION FOR A WRIT OF MANDAMUS SHOULD HAVE BEEN GRANTED BECAUSE THE DISTRICT COURT LACKS JURISDICTION OVER THIS CASE BECAUSE CONGRESS LACKS AUTHORITY TO TAX FIREARM PARTS, AND SPECIFICALLY UNATTACHED FIREARMS BARRELS AND FIREARM FRAMES – RECEIVERS WITHOUT BARRELS, UNDER THE CONTROL OF A PERSON PURSUANT TO TITLE 26 U.S.C. § 5861(d)

Title 26 U.S.C. § 5861(d) provides that it is unlawful for any person to receive or possess a firearm that is not registered to him in the National Firearms Registration and Transfer Record, hereinafter the "NFRTR". It is established that § 5861(d) is a valid exercise of the power of Congress to tax. *United States v. Tous*, 461 F. 2d 656, 657 (9th Cir. 1972). The statute is clear that Congress has power to tax only certain types of fully assembled firearms under this section. Title 26 U.S.C. § 5845(a). In this case, the federal court lacks jurisdiction because Dr. Morgan did not possess a firearm on July 2, 2002 that meets the criteria under § 5845.

The firearm that is allegedly the subject of the indictment is a fully assembled Bushmaster model XM15-E2S, semi-automatic AR-15 firearm, with a (attached) barrel of less than 16 inches in length – a "short barreled rifle".

This firearm has two major components: (1) the lower receiver or firearm frame, which has the serial number, trigger mechanism, hammer mechanism, and ammunition clip insertion port, and (2) the upper receiver, which includes the barrel and sights, and is attached to the lower receiver by two metal pins. The upper receiver has no registration requirement. (Exhibit "D", p. 93). The AR-15 firearm can also be assembled with a long barreled (greater than or equal to 16 inches in length) upper receiver. This type of "long barreled" firearm, even if assembled, is not required to have a tax paid and be registered in NFRTR. (Exhibit "I", pp. 132-133, Exhibit "D", p. 93.)

Dr. Morgan did not have a fully assembled short-barreled rifle at his residence on July 2, 2004. Instead, he had unassembled firearm parts – firearm frames and short and long barreled upper frames. The specific items in the indictment were Bushmaster [model XM15-E2S] AR-15 semi-automatic lower receivers (firearm frames), without barrels attached, which had been legally purchased from a Federal Firearms Licensee (not Cole Distributing) sometime before January 1, 2000. (Exhibit "D", pp. 92-94.)

On July 2, 2002, the Bushmaster AR-15 semi-automatic lower receivers cited in the indictment, did not have attached to them upper receivers with barrels. (Exhibit "D", 90-94.) Neither the AR-15 lower receiver component, with no attached barrels, nor the upper receiver component with barrels (not attached to the lower receivers) were or, are required to have a Federal tax paid or to be registered with the NFRTR, when they are part of a collection of components that could be assembled in a variety of ways. *United States v. Thompson/Center Arms*

Co., 504 U.S. 505, 510-518, 112 S. Ct. 2102, 119 L. Ed. 2d 308 (1992) (Holding that unassembled gun parts, [specifically barrels of less than 16 inches in length and barrels greater than 16 inches in length and unattached firearm receivers, possessed by an individual], are not taxable by the federal government). (Exhibit "I", pp. 131-133.)

As in *Thompson/Center*, a variety of legal firearm parts that could be assembled in different configurations, were found at Dr. Morgan's residence. Some of these components, if assembled – the short barreled rife, for example – would be subject to tax and some, when assembled – the "long" barreled rifle – would not. Specifically, there were, as part of a legal firearm collection at Dr. Morgan's residence on July 2, 2002, AR-15 upper receivers, some of which had long barrels, and some of which had short barrels. Dr. Morgan has no recollection that any of the upper receivers with short barrels were ever attached to AR-15 lower receivers – an assembled "short barreled" rifle. (Exhibit "D", pp. 90-94, Exhibit "I", pp. 131-133.) Furthermore it is not a violation of 26 U.S.C. § 5861(d) to possess a lower receiver (the part-frame of the firearm with a recorded serial number), an unattached pistol upper receiver (an upper receiver with a barrel less than 16 inches long) and an unattached rifle upper receiver (an upper receiver with a barrel greater than or equal to 16 inches in length). *United States v. Thompson/Center Arms Co.*, *supra*, 504 at 510-518.

Dr. Morgan and his pregnant wife were 200 miles from home, when the warrant was served and could not observe the condition of the firearm components when confiscated from his residence. (Exhibit "D", p. 92.) Either type of AR-15 upper receiver (pistol or rifle) can be attached to or removed from an AR-15 lower receiver in a

matter of seconds through the use of two metal pins. (Exhibit "D", pp. 92-94.)

It is Dr. Morgan's best recollection that, on and prior to July 2, 2002, no AR-15 upper receivers with barrels of less than 16 inches in length were attached to any AR-15 lower receivers. (Exhibit "D", pp. 93-94.) Further, because he was not in a financial position to contest it, he forfeited without contest in August 2002 his entire legal firearm collection. (Exhibit "D", p. 92, Exhibit "G", pp. 111-119.) Even so, twelve months after the warrant was served on Dr. Morgan's home he was indicted for knowingly possessing two Bushmaster (model XM15-E2S) AR-15 firearms with barrels of less than 16 inches not registered in the NFRTR. (Exhibit "B", pp. 69-70.)

Jurisdiction should also fail because the ATF Agent's probable cause for the warrant was based on mistaken and attenuated assumptions. In particular, probable cause for the warrant was based on Dr. Morgan's alleged receipt of packages shipped to him by Cole Distributing. From this, the ATF agent apparently assumed that (1) the packages were intended for Dr. Morgan (in fact, one was not); (2) that the packages contained unassembled complete machine guns; (3) that the parts sent could be assembled into working machineguns without any other parts or expertise and (4) that Dr. Morgan had the ability to do so. In fact, what the agent found were useless machinegun parts that had been altered so as to be inoperable. (Exhibit "D", p. 88.)

Cole Distributing, a company in Kentucky, sold to the general public cut up and destroyed Uzi machinegun parts, as "parts kits" via the Internet at www.cole distributing.com. (Exhibit "D", p. 86.) During the summer

of 2001, UPS records showed that Dr. Morgan received shipments from Cole Distributing between July 23, 2001 and August 10, 2001. (Exhibit "A", p. 63.)

Dr. Morgan received metal Uzi parts from Cole Distributing. These parts were pieces of metal that required additional manufacturing, welding, assembly and further effort to make the parts functional or capable of firing. (Exhibit "D", pp. 88-89.) In order to transform these metal parts into a firearm requiring registration, the pieces would have required at least three inches of additional tempered steel, bent in a complex series of angles and curves, precisely welded in place with perfect alignment of all the new and old parts, and additional knowledge of metallurgy to correctly construct a firearm. Months of additional time and knowledge of metal fabrication and metallurgy would have been required to "assemble" these parts into "firearms" such that they may have been able to fire a single bullet, let alone fire automatically. (Exhibit "D", p. 88.) Dr. Morgan does not possess this knowledge of metal fabrication and metallurgy to construct the pieces of metal into a firearm. (Exhibit "D", pp. 88-89.)

The metal parts that were received from Cole Distributing were simply metal pieces, they were advertised as parts, Dr. Morgan purchased them as parts and they were sent to Dr. Morgan as parts. (Exhibit "D", pp. 86-89.) These metal "parts" do not fall under the definition of a completed firearm as envisioned by Title 26 U.S.C. § 5845(a) and therefore are not required to be registered with the NFRTR. Based on the language of the statute, Congress only has the power to tax completed firearms and lacks power to tax firearm parts.

The fact that Dr. Morgan received metal parts is not in dispute. During the hearing to quash the warrant, the district court described the package Dr. Morgan received from Cole Distributing as metal pieces when it stated that Dr. Morgan possessed a firearm, *albeit pieces of a firearm that aren't registered.* (RT 8/23/04 p. 8, Exhibit "C", p. 78.) Because Dr. Morgan received only packages containing parts of firearms and because these parts could not be converted into an operational firearm as contemplated in § 5845(a) without the specialized procedure describe above, he was not required to register these parts and there is no violation of § 5861(d). Congress only has authority to tax complete firearms as described in § 5845(a), not pieces of metal. Because the district court lacks jurisdiction in this case, this petition for a writ of certiorari should be granted.

In *United States v. Stewart*, 348 F. 3d 1132, 1133 (9th Cir. 2003), the defendant sold parts kits for the manufacture and assembly of rifles. He advertised the parts kits on the Internet and believed they were legal to sell because the rifles were not completely machined and not usable as firearms. After an ATF raid, Stewart was charged with and, convicted of unlawful possession of a machinegun. The issue in Stewart was whether or not Congress can, under its Commerce Clause power, prohibit the mere possession of homemade machineguns. *Id.* at 1133. The Ninth Circuit reversed Stewart's felony conviction for possession of homemade machineguns.

The court held in *Stewart* that Congress did not have power under the Commerce Clause to prohibit Stewart's possession of his machineguns because "components" or parts of Stewart's machinegun crossed state lines, but these components did not add up to a gun. The court said

that the components were not even close to a gun. It found that many additional parts and tools, as well as expertise and industry were needed to create functioning machineguns from the "parts" Stewart legally purchased. *Id.* at 1136.

Similarly, in the present case, the "parts" received by Dr. Morgan needed additional parts and tools and expertise to construct a firearm. (Exhibit "D", pp. 88-89.) Because these parts do not make a firearm, Congress does not have the power to tax them and these parts do not have to be registered pursuant to § 5861(d). Since these parts do not have be registered pursuant to § 5861(d), the federal court lacks jurisdiction, the warrant should be quashed, and the case must be dismissed.

The Court lacks jurisdiction over this case because Congress lacks the power to tax unattached firearm parts, specifically unattached rifle and pistol barrels, and firearm receivers without barrels attached under the possession of a person, pursuant to Title 26 U.S.C. § 5861(d). *United States v. Thompson/Center Arms Co., supra,* 505 U.S. at 510-518. Because the district court lacks jurisdiction in this case, this petition for a writ of certiorari should issue directing the Ninth Circuit to dismiss the indictment for lack of jurisdiction.

B. THE PETITION OF MANDAMUS SHOULD HAVE BEEN GRANTED BECAUSE THE EVIDENCE SEIZED AT DR. MORGAN'S RESIDENCE SHOULD BE SUPPRESSED AND THE INDICTMENT DISMISSED BECAUSE THE INFORMATION PROVIDED TO THE MAGISTRATE JUDGE WAS STALE AND COULD NOT UNDER ANY AUTHORITY ESTABLISH PROBABLE CAUSE

The petition for a writ of certiorari should be granted in this case because the lower court's order finding that probable cause existed to issue the search warrant is erroneous as a matter of law pursuant to this Court's law. United States Supreme Court law provides that the facts in an affidavit presented to a magistrate in support of a search warrant must provide a substantial basis for the judge to conclude that the object of the search is probably on the premises at the time the warrant is issued. *Illinois v. Gates*, 462 U.S. 213, 239, 76 L. Ed. 2d 527, 103 S. Ct. 2317 (1983).

In the present case, no probable cause existed to issue the warrant because the facts presented in Agent Curran's affidavit did not provide a substantial basis for the magistrate judge to conclude that any illegal firearms were at the home of Dr. Morgan because the information in the affidavit was stale – almost one year old – and the affiant Agent Curran failed to present any specific and recent information suggesting that Dr. Morgan was participating in any illegal conduct or had any unregistered firearms at the time the warrant was issued. (Exhibit "A", pp. 60-66.)

On June 27, 2002, Agent Curran's affidavit's stated UPS records showed that Dr. Morgan received three UPS packages from Cole Distributing on July 27, 2001, August

7, 2001, and August 10, 2001. (Exhibit "A", p. 63.) The affidavit further stated that a record search revealed that Dr. Morgan did not have any machineguns registered in the National Firearms Registration and Transfer Record. (Exhibit "A", p. 64.) Based on this aged information, the magistrate issued a warrant and authorized the agent to search Dr. Morgan's home to search for contents of packages he received via UPS ten months before. (Exhibit "A", p. 57.)

The law provides that even the "most convincing proof that the property was in the possession of the person or upon the premises at *some remote time in the past* will not justify a present invasion of privacy." (Emphasis added.) *United States v. Alvarez*, 358 F. 3d 1194, 1203 (9th Cir. 2004.) The fact that UPS may have delivered packages to Dr. Morgan's residence the year before, did not justify a current search, and no probable cause can be established. *Id.*

In *Alvarez* the informant told agents that the defendant was involved in surveillance activities in connection with the transportation of loads of cocaine in 1996 and 1998, and that he provided radios to surveillance drivers. The informant also said that defendant stored radios at his house. *Id.* at 1203. A year later, in 1999, the magistrate judge concluded that there was probable cause that contraband would be found at Alvarez' home and issued a search warrant. Agents seized radios, police scanners, and a transceiver device.

Alvarez argued that the affidavit failed to establish probable cause because among other things, the one-year-old information in the affidavit was too stale to establish probable cause that surveillance equipment would be

found on the premises when the search warrant was executed in 1999. *Id.* at 1203. The court concluded that the magistrate in *Alvarez* had a substantial basis for his finding of probable cause because there were four separate confidential informants who implicated Alvarez in the counter-surveillance activities in connection with the widespread cocaine conspiracy that spanned five years. "The fact that the confidential informants' information related in 1996 and 1998 does not render the 1999 warrant stale because the case involved an extensive and long-standing drug conspiracy". *Id.* at 1204. Evidence of the existence of a widespread, firmly entrenched, and ongoing [narcotics] operation diminishes a staleness argument. *Id.* at 1203.

In the present case, there was no evidence of widespread or ongoing criminal activity over a period of years, nor was there any current information such as the pen register data in *Alvarez* to establish that there was evidence of recent criminal activity at Dr. Morgan's residence. (Exhibit "A", pp. 60-66.)

Agent Curran had no personal knowledge of the facts concerning Cole Distributing. He was told by another law enforcement officer in another state that Dr. Morgan allegedly ordered several shipments of "12 Uzi machine guns" [sold as parts kits] and someone from UPS told Curran that Dr. Morgan received three shipments from Cole Distributing the summer before. (Exhibit "A", p. 63.) The affidavit does not explain how it was established that Dr. Morgan ordered shipments, nor is there is any explanation of what was inside those packages delivered to Dr. Morgan by UPS. (Exhibit "A", pp. 60-66.)

Agent Curran stated in his affidavit that Cole Distributing sold the machineguns as "parts kits". (Exhibit "A", p. 61.) Agent Curran jumped to the conclusion that the "parts kits" as sold are complete firearms capable of firing automatic (sic) when assembled. (Exhibit "A", p. 63.) Curran failed to offer any evidence to explain how cut up metal parts can be complete firearms. Curran utterly failed to inform the court of the intricate procedure and specialized knowledge necessary to transform these metal pieces from the "parts kits" into a complete firearm. (Exhibit "A", pp. 60-66, Exhibit "D", pp. 88-89.)

In order to transform the "parts" received by Dr. Morgan into a complete firearm, the parts would have required at least three inches of additional tempered steel, bent in a complex series of angles and curves, precisely welded in place with perfect alignment of all the new and old parts, and additional knowledge of metallurgy to correctly construct a firearm. Months of additional time and knowledge and metal fabrication and metallurgy would have been required to construct these parts into firearms such that they may have been able to fire a single bullet, let alone "automatic" (sic). (Exhibit "D" p. 89.) Dr. Morgan does not possess this knowledge of metal fabrication and metallurgy to construct the pieces of metal into a firearm. (Exhibit "D", p. 89.) The Government in its opposition, cited by the Court also clarified this point when it stated that the items received by Dr. Morgan "would take some time to assemble" into functioning firearms. (Exhibit "J", p. 149.)

Agent Curran's affidavit, at best, could suggest that there is a remote chance that parts of firearms may be present at Dr. Morgan's residence. The court in *United States v. Gourde*, 382 F. 3d 1003 (9th Cir. 2004) flatly

found that a "chance" that an item may be found at a residence cannot support a finding of probable cause and violates the constitution. The court said, "The Fourth Amendment requires a *fair probability* that the items searched for will be found." *Id.* at 1011. The court in *Gourde* concluded that the agent affidavit failed to establish a fair probability that contraband or evidence of a crime would be found at Gourde's home and found the affidavit did not establish probable cause. *Id.* at 1012.

The district court did not decide whether or not the facts in affidavit established probable cause because it concluded that the ATF agents that executed the warrant at Dr. Morgan's home acted in good faith. (Exhibit "F", p. 105.) (Appendix "2".)

In *United States v. Leon*, 468 U.S. 897, 918-919, 82 L. Ed. 2d 677, 104 S. Ct. 3405 (1984), the Court held that even if there was no probable cause to search, officers may rely in good faith on the warrant's validity because it was issued by a magistrate. However, an officer does not "manifest objective good faith in relying on a warrant based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable" *Id.* at 899. "Because law enforcement officers are not lawyers and because they must often make 'hurried judgments', courts should not exclude probative evidence when officers make reasonable mistakes in obtaining a warrant." *United States v. Weber*, 915 F. 2d 1282, 1289 (9th Cir. 1990).

In the present case, Agent Curran did not make a hurried judgment in obtaining the search warrant. Federal agents in Kentucky contacted Agent Curran on May 22, 2002 and requested him to conduct an investigation

regarding the shipments Dr. Morgan received the summer before from Cole Distributing. (Exhibit "A", p. 61.) Over one month later, on June 27, 2002, Agent Curran prepared his affidavit and presented it to the magistrate judge. (Exhibit "A", p. 57.) As will be explained in greater detail below, Agent Curran's affidavit was so lacking in probable cause, Agent Curran's reliance on its validity was unreasonable, and he did not act in good faith in executing the warrant.

In *United State v. Gourde*, the case discussed above, the court also found that the officers did not act in good faith in executing the warrant at Gourde's residence because there were no facts in the affidavit to establish probable cause. *United States v. Gourde*, *supra*, 382 F. 3d at 1013-1014. The court found that the officers did not act in good faith because they failed to take further steps to ascertain the presence of illegal activity at Gourde's house and failed to present other target-specific corroborating information linking Gourde's two month membership in a child pornography website to his probable possession of child pornography. *Id.* at 1014. The court also found it significant that the officers in *Gourde* were under no time pressure and had ample opportunity to take the steps described above and failed to do so. *Id.* at 1013-1013.

Similarly, even though Agent Curran was under no time pressure, Agent Curran made no attempt whatsoever to conduct a minimal independent investigation to ascertain whether or not illegal firearms were at Dr. Morgan's residence. (Exhibit "A", pp. 60-66.) There was no investigation to confirm what was sent to Dr. Morgan from Cole Distributing and to confirm what was inside the boxes sent to Dr. Morgan via UPS. (Exhibit "A", pp. 60-66.) The metal parts that Dr. Morgan received were advertised and

made available to the general public by Cole Distributing as "parts kits". (Exhibit "A", p. 61.) Agent Curran knew this because he wrote in his affidavit that Cole Distributing sold the product as "parts kits" and any investigation would have revealed that Dr. Morgan received metal parts that require extensive and specialized procedures to transform the parts into a firearm. (Exhibit "A", p. 61, Exhibit "D", p. 88.) As discussed above, these metal parts are not required to be registered with the NFRTR.

Furthermore, there was no evidence in the affidavit suggesting what Dr. Morgan received the year before via UPS was at his residence at the time the search warrant was issued. (Exhibit "A", pp. 60-66.) Also, Dr. Morgan had no prior criminal history, which with all the facts described above, should have prompted Agent Curran to strongly suspect that no illegal conduct was occurring at Dr. Morgan's residence. Agent Curran was required to have conducted a minimal investigation. The investigation would have shown that there was no reason to suspect there was any illegal activity at Dr. Morgan's residence because Dr. Morgan purchased a legal product from Cole Distributing eleven months prior to the issuance of the warrant.

The district court in finding Agent Curran acted in good faith: quoted *United States v. Fowlie*, 24 F. 3d 1059, 1067 (9th Cir. 1994): "Nevertheless, the officer's reliance on the magistrate's probable cause determination and on the technical sufficiency of the warrant . . . must be objectively reasonable . . . [T]he Ninth Circuit has described this inquiry as "whether the affidavit was sufficient to create disagreement among thoughtful and competent judges as to the existence of probable cause." (Exhibit "F", p. 6.) As argued above, as a matter of law,

the stale facts contained in Agent Curran's affidavit do not meet the threshold established by federal law to reasonably infer that illegal firearms would be found at Dr. Morgan's home on June 27, 2002. Furthermore, Agent Curran, as a firearms expert, should have known that what Dr. Morgan received from Cole Distributing was a legal product not requiring registration. Therefore, because the affidavit severely lacked probable cause that firearms would be at Dr. Morgan's home on June 27, 2002, the agents failed to act in good faith in executing the search warrant. Based on the foregoing, this petition for a writ of certiorari should be granted.

C. THE PETITION FOR A WRIT OF MANDAMUS SHOULD HAVE BEEN GRANTED BECAUSE A FELONY CONVICTION UNDER 28 U.S.C. § 5861(d) VIOLATES THE EIGHTH AMENDMENT BECAUSE THE UNDERLYING CONDUCT IS FAILURE TO PAY A $200.00 FEDERAL TAX ON A FIREARM WHICH IS ALSO PUNISHABLE BY A LIEN ON A SEIZURE OF PROPERTY, OR A MISDEMEANOR

Dr. Morgan was charged with possessing a firearm that was not registered to him in the National Firearms Registration Record in violation of Title 26 United States Code § 5861(d). (Exhibit "B", pp. 69-70.) Because it is not illegal to possess a firearm in this country, the underlying offense is failure to pay a $200.00 tax to the United States Treasury and receive a tax stamp as proof of payment. The United States derives its jurisdiction over firearms regulated by the National Firearms Act through its taxing authority [Title 26 U.S.C.], specifically Title 26 U.S.C. § 5821. There are other statutes with much less severe

penalties that could be applied for the identical alleged violation, via Title 26 U.S.C. § 5846. These statutes would apply for the identical behavior charged in the Indictment in this case. Dr. Morgan could have been charged with a failure to pay the tax required for registration under these statutes. In this case, Title 26 U.S.C. § 6332 would also apply and the property in question has already been surrendered. The penalty for the alleged offense has already been met. (Exhibit "D", p. 92, Exhibit "G", pp. 111-119.)

When the tax is paid pursuant to § 5821, the United States Treasury issues a stamp, and the offense is failure to pay the tax and receive a tax stamp, the defendant could have been charged with a violation of 26 U.S.C. § 7809, the penalty for which is a misdemeanor with a maximum $1000.00 fine.

All of these penalties are far less severe than the penalties levied under 26 U.S.C. § 5861(d) and Dr. Morgan could have been charged with any of these for the alleged activity. The conduct of this offense amounts to an infraction or at the maximum a misdemeanor – not a felony. Charging Dr. Morgan with a violation of 26 U.S.C. § 5861(d) in this case, is a violation of the Eighth Amendment.

Instead of fining, or accepting the forfeited property in lieu of a fine, or charging Dr. Morgan with a misdemeanor, the government chose instead, to convene a grand jury, present evidence to a grand jury, and ask for a federal indictment charging Dr. Morgan with Title 28 U.S.C. § 5861(d). Under the United States Sentencing Guidelines, the base offense level for violations of § 5861(d) is Level 18. Level 18 and a Criminal History Score of I provides for

a sentencing guideline range of 27 to 33 months. A federal prison sentence of 27 to 33 months is grossly disproportionate to an offense that results in a $1000.00 fine or a misdemeanor, and therefore violates the Eighth Amendment. *Harris v. Wright*, 93 F. 3d 581, 583 (9th Cir. 1996) (stating that the Eighth Amendment bars punishments that are grossly disproportionate to the crime).

Furthermore, the conviction is cruel and unusual because a federal felony conviction in this case would destroy Dr. Morgan's reputation as a physician, his ability to continue to teach health issues to the public and the medical profession, his medical license would be revoked, thus preventing him from caring for his patients and seeking employment in a profession that he has practiced for 23 years.

D. THE PETITION FOR MANDAMUS SHOULD HAVE BEEN GRANTED BECAUSE DR. MORGAN WILL BE DAMAGED AND PREJUDICED IN A WAY NOT CORRECTABLE ON APPEAL

The Ninth Circuit denied Dr. Morgan's petition for a writ of mandamus. The Ninth Circuit denied the writ of mandamus because it found that "petitioner has not demonstrated that effective post-conviction review of the district court's ruling that petitioner challenges is unattainable. *See Bauman v. United States Dist. Court*, 557 F. 2d 650, 654-55 (9th Cir. 1977)". (App. "1" and App. "3".) This petition for a writ of certiorari should be granted because Dr. Morgan has demonstrated and maintains that effective post-conviction review is impossible because, if this case proceeds to an appeal, Dr. Morgan will be damaged and prejudiced in a way not correctable on appeal. *Bauman v. United States Dist. Court, supra*, 557 F. 2d at

653. In the motion for reconsideration, Dr. Morgan respectively argued that the Ninth Circuit may have overlooked material facts in this case: If Dr. Morgan is convicted of a felony, regardless of the status of appeal or incarceration, the California Medical Board would extensively investigate his license, place him on probation or restriction, and he will likely face loss of the license. Dr. Morgan's reputation in the medical community and work environment would be destroyed even he was able to work in any capacity as a physician.

In addition, Dr. Morgan speaks and teaches in the medical community, without a license and a board certification, his medical career will be over. In other words, there is no effective post-conviction remedy in this case because the harm to Dr. Morgan is irreparable. If Dr. Morgan is convicted and prevails on appeal, Dr. Morgan who has been a physician for twenty-three years will lose his livelihood, reputation, and career. Just as important is the effect this would have on Dr. Morgan's current one-thousand (1000) patients that have come to depend on him for care and personalized attention. Dr. Morgan saves and prolongs lives and due to his treatment many of them remain alive today due to his treatment. In his absence, these patients' lives could be irreparably harmed, including premature death. (Declaration of Dr. Morgan, filed as Exhibit "D" with the Petition for a Writ of Mandamus.)

In *Bauman v. United States Dist. Court*, *supra*, 557 F. 2d at 654-655, the court made clear a petition for a writ of mandamus should be granted if a petitioner will be damaged or prejudiced in a way not correctable on appeal. Recent Ninth Circuit case law affirms this authority. *Spencer v. United States District Court*, 393 F.3d 867, 869 (December 14, 2004, 9th Cir. 2004).

As stated in the original petition, Dr. Walter Morgan has been practicing medicine for twenty-three years and is currently the Residency Director for the Family Medicine Residency Program at Kaiser Permanente Medical Center Riverside, California, a position he has held for 15 years. Dr. Morgan also currently holds academic appointments as Assistant Clinical Professor at the USC School of Medicine, Assistant Clinical Professor at the Loma Linda University School of Medicine, and he also lectures in the medical community.

Of his 1000 regular patients, many of them are patients over the age of 65 and are diagnosed with multiple chronic medical problems. Dr. Morgan needs to continue to treat these patients to prevent them from dying. Dr. Morgan's continued treatment of these patients, not only saves their lives, his medical care supports an optimally managed lifestyle and provides wellness and security. Dr. Morgan treats his patients for a variety of cancer, congestive heart failure, heart attacks, stroke, high blood pressure, diabetes, kidney failure, emphysema, arthritis, and liver failure. (Exhibit "D" to Petition for a Writ of Mandamus.)

Should Dr. Morgan get convicted of any criminal act, the effect upon his professional credentials, licensing, reputation and employment would be devastating. As a result of any conviction, if he is incarcerated, the California Medical Board would immediately revoke his license. (Exhibit "D" to Petition for a Writ of Mandamus.)

If Dr. Morgan is convicted and free on bail pending appeal, Dr. Morgan would summarily lose his license as well. If convicted of any felony, regardless of the status of the appeal or incarceration, the California Medical Board

would summarily revoke his medical license, pending an investigation, or less likely place him on probation or restriction in the unlikely event his medical license is restored at a later date. Dr. Morgan would no longer be able to teach and speak in the medical community. Absent a medical license and a reputation, Dr. Morgan's medical career would be over. Additionally, once Dr. Morgan loses his license, he will never again be able to become Board Certified. (Exhibit "D" to Petition for a Writ of Mandamus.) Therefore, because Dr. Morgan will be irreparably harmed, even if he prevails on his appeal, this petition for a writ of certiorari should be granted.

CONCLUSION

For the foregoing reasons petitioner respectfully submits that the petition for writ of certiorari should be granted.

Respectfully submitted,

BARRY O. BERNSTEIN
Attorney for Petitioner

APPENDIX 1

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In re: WALTER C. MORGAN. --- WALTER C. MORGAN, Petitioner, v. UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, Respondent, UNITED STATES OF AMERICA, Real Party in Interest.	No. 04-76721 D.C. No. CR-03-00837-CAS Central District of California, Los Angeles ORDER (Filed Feb. 14, 2005)

Before: FERNANDEZ, GRABER and GOULD, Circuit Judges

Petitioner has not demonstrated that effective post-conviction review of the district court's ruling that petitioner challenges is unattainable. *See Bauman v. United States Dist. Court,* 557 F.2d 650, 654-55 (9th Cir. 1977). Moreover, there is a compelling interest in the prompt resolution of criminal actions. *See Flanagan v. United States*, 465 U.S. 259, 265 (1984). Accordingly, the petition for a writ of mandamus is denied.

APPENDIX 2

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

UNITED STATES OF AMERICA, vs. WALTER C. MORGAN, Defendant.	)	Case No. CR 03-837-CAS **ORDER DENYING MOTION TO QUASH THE SEARCH WARRANT AND SET ASIDE INDICTMENT** (Filed Aug. 25, 2004)

I. FACTUAL AND PROCEDURAL BACKGROUND

On June 27, 2002, United States Magistrate Judge Stephen Larson issued a warrant to search defendant Walter Morgan's residence at 3720 Beechwood Place, Riverside, California, and to seize firearms as well as documents and items related to the acquisition of firearms. *See* Opp., Ex. A. Special Agent Christopher R. Curran of the Bureau of Alcohol, Tobacco & Firearms ("ATF") filed an affidavit in support of the search warrant, stating that he believed defendant's residence contained evidence of violations of 26 U.S.C. § 5861(d) (possession of firearms not registered in the National Firearms Registration and Transfer Record) and violations of 18 U.S.C. § 922(o) (possession of a machinegun). Curran Affidavit ¶ 13.

Curran stated in the affidavit that the ATF had previously executed search warrants at the business locations of two firearms distributors, Cole Distributing and J&T Distributing, and the ATF had obtained business

records revealing that defendant had received shipments of firearms from "either Cole Distributing or J&T Distributing between July 23, 2001 and August 24, 2001." Curran Affidavit ¶ 4(g).

Curran further stated that a search of United Parcel Service ("UPS") records on May 23, 2002, revealed that defendant had received shipments from Cole Distributing at 3720 Beechwood Place, Riverside, California, on July 27, 2001, August 7, 2001, and August 10, 2001. Curran Affidavit ¶ 6. A search at the California Department of Motor Vehicles indicated that defendant resided at the same address where he had received the firearm shipments. Curran Affidavit ¶ 5.

On May 24, 2002, Curran requested that ATF Inspector James Palm search the ATF Federal Firearms Licensee database. Curran Affidavit ¶ 7. Curran stated that the search revealed defendant was not a licensed Federal Firearms Licensee. *Id.* Likewise, a May 29, 2002 search of the ATF National Firearms Registration and Transfer Record indicated that defendant had "at no time had any Uzi or Maxim machineguns registered to him." Curran Affidavit ¶ 8. Finally, a May 30, 2002 search indicated that defendant did not have a Certificate of Eligibility on file with the Firearms Division of the California Department of Justice, as is required by California law to engage in the licensed sale of firearms. Curran Affidavit ¶ 9.

Following the June 27, 2002 issuance of a search warrant, special agents from the ATF executed the search warrant on July 2, 2002, at defendant's residence.[1]

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[1] The government asserts that during the search, ATF agents "recovered approximately 50 assault weapons (as defined by state law),

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Defendant was charged on August 19, 2003, with one count of possession of unregistered firearms, in violation of 26 U.S.C. § 5861(d). The indictment alleges that "[o]n or about July 2, 2002, in Riverside County . . . defendant Walter Curran Morgan knowingly possessed firearms, namely two Bushmaster model XM15-E2S rifles having barrels of less than 16 inches in length, which had not been registered to him in the National Firearms Registration and Transfer Record as required by Title 26, United States Code, Chapter 53."

Defendant filed a motion to quash the search warrant and set aside the indictment on February 23, 2004. The government filed an opposition on March 1, 2004.

II. DISCUSSION

Defendant argues that the United States does not have jurisdiction over machine gun parts traveling in interstate commerce, pursuant to the recent decision by the Ninth Circuit Court of Appeals in *United States v. Stewart,* 348 F.3d 1132 (9th Cir. 2003). Mot. at 6. In particular, defendant argues that "[a]t the time the [seized firearms] traveled in interstate commerce, they were nothing more than parts, not subject to any licensing or registration under the National Firearms Act or other Federal regulatory scheme." Mot. at 6. Defendant argues that "no interstate commerce argument attaches since at

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17 Uzi receivers . . . assorted conversion 'parts kits' for various types of firearms," as well as the two short-barreled rifles charged in the indictment. Opp. at 2. The government further asserts that the estimated value of the firearms and parts kits seized is over $38,000. *Id.*

the time of such interstate transport, the alleged illegal component was merely a gun part." *Id.*

Defendant acknowledges that *Stewart* is distinguishable on the ground that the indictment charges defendant with a violation of 26 U.S.C. 5861(d), and not 26 U.S.C. § 922(o); however, defendant maintains that "under the dicta and rationale of *Stewart*" defendant cannot be charged with possessing unregistered firearms. Mot. at 8-9. In particular, defendant asserts that both 18 U.S.C. § 922(o) and 26 U.S.C. § 5861(d) rely on the same machinegun definition as is provided in the National Firearms Act. Reply at 2. Defendant asserts that *Stewart* limited the scope of 26 U.S.C. § 5845(b) (defining at "machinegun") such that "[t]he parts kits [d]efendant received . . . do not fall within this definition." Reply at 2-3. Defendant therefore argues that "federal jurisdiction must fail" and the indictment must be dismissed. Mot. at 10, Reply at 2-3

Second, defendant contends that the search warrant issued on June 27, 2002, was facially invalid, because "[t]he precise 'machineguns' being sought, are not by definition machineguns under the definition and rationale of *Stewart.*" Mot. at 10. In particular, defendant argues that since the federal government has no jurisdiction to regulate firearms assembled from parts after shipment, the affidavit in support of the search warrant does not specify any evidence of criminal activity.

Finally, defendant argues that the issuance of the search warrant was based "upon wholly stale information" and therefore no probable cause existed at the time the warrant was signed. Mot. at 10-12, citing *United States v. Pitts,* 6 F.3d 1366, 1369 (9th Cir. 1993); *United States v.*

Gann, 732 F.2d 714 (9th Cir. 1984). Defendant contends that he "allegedly received machinegun part kits between July 23, 2001 and August 10, 2001," however, the search warrant was not issued until June 27, 2002. Mot. at 12. Defendant further contends that "the affidavit does not cite evidence that [defendant] had a continuing pattern, or ongoing criminal activity, that would link him with currently possessing machineguns or unregistered firearms." Mot. at 12. Therefore, defendant argues that warrant "should be quashed." Mot. at 14.

The government responds that it has jurisdiction to prosecute defendant's alleged violation of 26 U.S.C. § 5861(d). The government argues that *Stewart* is inapplicable in the instant case, because the Ninth Circuit has previously upheld 26 U.S.C. § 5861(d) as a valid exercise of Congress' taxing power, and rejected a Commerce Clause challenge to § 5861(d). Opp. at 5, citing *United States v. Mack,* 164 F.3d 467, 473. Therefore, the government asserts that the Commerce Clause analysis undertaken in *Stewart* in the context of an as-applied challenge to 18 U.S.C. § 922(o) is inapplicable to the violation of 26 U.S.C. § 5861(d) that defendant is charged with in the indictment.

The government next argues that the search warrant issued on June 27, 2002, was supported by probable cause. Opp. at 6-13. The government asserts that a determination of probable cause is based on the information available to law enforcement officers at the time of the search. Opp. at 8, citing *United States v. Soriano,* 346 F.3d 963, 972 (9th Cir. 2003). Therefore, because *Stewart* was decided in November 2003, after the warrant at issue was executed, the government argues that *Stewart* has no bearing on a determination of whether probable cause

existed at the time of the search. Opp. at 8. In addition, the government argues that the affidavit in support of the search warrant listed two possible violations of law – a violation of 26 U.S.C. § 5861(d), and a violation of 26 U.S.C. § 922(o) – and because the affidavit contained probable cause as to a violation of § 5861(d), the magistrate judge had a substantial basis to conclude that probable cause existed. Opp. at 9.

The government also disputes defendant's contention that the search warrant was based on stale information. Opp. at 10-12. Rather, the government argues that under the totality of the circumstances there was a fair probability for the magistrate judge to conclude that defendant, having received several shipments totaling 12 machine guns at his residence, would maintain these firearms at his residence such that evidence of defendant's possession of the unlawful firearms would be at his residence approximately ten months after the last shipment, Opp. at 11. The government further argues that "[w]ith respect to firearms offenses that are of a continuing nature, such as the unlawful possession and registration offenses for which evidence was sought in this case, the date of the information contained in the search warrant affidavit is less significant."[2] Opp. at 10, citing *United States v. Maxim,* 55 F.3d 394, 397 (8th Cir. 1995). In further

[2] The government also characterizes defendant's residence as a "secure operational base" such that the passage of time is less important in determining the existence of probable cause. Opp. at 11, citing *United States v. Greene,* 250 F.3d 471, 481 (6th Cir. 2001). Defendant contends that his residence should not be considered to be a "secure operational base" because defendant only received three shipments of firearms, rather than receiving a series of continuing and ongoing firearm shipments, Reply at 5.

support of the contention that the shipment information was not stale, the government cites Curran's professional opinion in the affidavit that "persons who illegally possess firearms commonly maintain them at their residence and commonly maintain or establish a collection for their personal enjoyment" Opp. at 10-11. Finally, the government argues that "the fact that defendant received 'parts kits,' which presumably would take some time to assemble, [coupled with the factors cited above] provide a substantial basis for the magistrate's determination of probable cause." Opp. at 11.

Even if probable cause did not exist to support the issuance of the search warrant, the government argues that evidence gathered in the search of defendant's residence would still be admissible "because the executing officers relied in good faith on the validity of the . . . search warrant," and such reliance was objectively reasonable. Opp. at 13-14, citing *United States v. Leon,* 468 U.S. 897 (1984); *United States v. Fowlie,* 24 F.3d 1059, 1067 (9th Cir. 1994). The government contends that "[a]t the very least, [Curran's] affidavit established a 'plausible theory' that evidence might be found at defendant's residence" sufficient to apply the good faith reliance exception created by *Leon.* Opp. at 14.

Finally, the government asserts that defendant has identified no grounds for rejecting application of the good faith exception.[3] Opp. at 15, citing *United States v. Leon*

[3] In his reply, defendant argues that the ATF agents did not act in good faith reliance on the warrant. First, defendant contends that the supporting affidavit was blatantly lacking in probable cause because Curran did not conduct an investigation independent of stale

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468 U.S. 897, 923 (1984) (stating that good faith reliance on a warrant will not render evidence seized pursuant to a warrant admissible if: (1) the judge issuing the warrant "wholly abandoned his judicial role;" (2) the warrant is "facially deficient;" or (3) the issuing court "was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard for the truth").

Therefore, the government concludes that "because Agent Curran obtained a warrant{dots3}this Court should deny defendant's motion on the separate and independent ground that the agents acted in good faith reliance on the search warrant." Opp. at 17.

26 U.S.C. § 5861(d) provides that "[it] shall be unlawful for any person . . . to receive or possess a firearm which is not registered to him in the National Firearms Registration and Transfer Record." The Ninth Circuit has recently stated that "[w]e have already determined that

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information obtained through a prior investigation of Cole Distributing and J&T Distributing. Reply at 6-7.

Second, defendant contends that in the affidavit supporting the search warrant "Curran asserted certain facts which could be construed as statements made in reckless disregard for the truth." Reply at 7. According to defendant, one such statement includes a sentence in the Curran affidavit stating that "[t]he parts kits as sold [by Cole Distributing] are complete firearms, capable of firing automatic when assembled." Reply at 7, citing Curran Affidavit ¶ 4(f). Defendant contends that "this is factually inaccurate" because "[t]he parts kits were merely parts that could be used to construct guns and not as affiant asserts, disassembled firearms." Reply at 7. In a similar vein, defendant also cites Curran's statement that defendant "received several shipments totaling twelve (12) Uzi Machineguns" as a factual inaccuracy which could have misled the magistrate judge into assuming "that Defendant received actual machineguns." Reply at 7, citing Curran Affidavit ¶4(g).

the passage of § 5861(d) was a permissible exercise of Congress's taxing power." *United States v. Mack,* 164 F.3d 467, 473 (9th Cir. 1999), citing *United States v. Tous,* 461 F.2d 656, 657 (9th Cir. 1972) (per curiam). Therefore, § 5861(d) "is not vulnerable to a Commerce Clause challenge." *Mack,* 164 F.3d at 473. Because the Ninth Circuit has directly held that the passage of § 5861(d) was a permissible exercise of Congressional power – namely, the taxing power – defendant's arguments regarding the scope of the Commerce Clause power as defined by *Stewart* are irrelevant. The federal government has jurisdiction over the violation of § 5861(d) charged in the indictment.

Likewise, defendant's assertion that 18 U.S.C. § 922(o) and 26 U.S.C. § 5861(d) rely on "the same machinegun definition provided by the National Firearms Act" is misplaced, and not relevant to the violation of § 5861(d) alleged in the indictment. 26 U.S.C. § 5861(d) refers to the receipt or possession of "a firearm which is not registered," *not* a "machinegun." A "firearm" is defined by 26 U.S.C. § 5845(a) to include "a rifle having a barrel or barrels of less than 16 inches in length." The indictment charging defendant with a violation of 26 U.S.C. § 5861(d) comports with this definition of "firearm," alleging that "defendant possessed firearms, namely . . . rifles having barrels of less than 16 inches in length."[4] Therefore, the Court need not reach the merits of defendant's contention that *Stewart*

[4] While the Curran affidavit does state that defendant received shipments of machineguns as defined by 26 U.S.C. § 5845(b), the search warrant sought evidence not only for evidence of possession of machineguns in violation of 18 U.S.C. § 922(o), but also for evidence of unregistered firearms pursuant to 26 U.S.C. § 5961(d). *See* Curran Affidavit ¶ 2.

necessarily limits the scope of the definition of "machine-gun" in 26 U.S.C. § 5845(b).

The Court also concludes that the ATF agents executing the warrant acted in good faith reliance on the issuance of the warrant on July 2, 2002. Therefore the Court need not reach the issue of whether the issuance of the search warrant was based on stale information such that probable cause did not exist at the time the warrant was issued. "Searches pursuant to a warrant will rarely require any deep inquiry into reasonableness, for a warrant issued by a magistrate normally suffices to establish that a law enforcement officer has acted in good faith in conducting the search." *Leon,* 468 U.S. at 922. "Nevertheless, the officer's reliance on the magistrate's probable cause determination and on the technical sufficiency of the warrant . . . must be objectively reasonable . . . " *Id.* The Ninth Circuit has described this inquiry as "whether the affidavit was sufficient to create disagreement among thoughtful and competent judges as to the existence of probable cause." *Fowlie,* 24 F.3d at 1067, quoting *United States v. Hove,* 848 F.2d 137, 139 (9th Cir. 1988).

The Curran affidavit supports the existence of probable cause to believe that evidence would be found at defendant's residence. In particular, Curran stated that business records seized in separate searches indicated that defendant had received shipments of firearms from distributors between July 23, 2001, and August 24, 2001. *See* Curran Affidavit ¶ 4(g). A subsequent search of UPS records corroborated shipments from Cole Distributing to defendant's address within that time period. Curran Affidavit ¶ 6. The Curran affidavit also includes Curran's professional opinion that persons who buy firearms commonly maintain a collection of firearms and retain documents

related to the acquisition of such firearms. *See* Curran Affidavit ¶¶ 10-12. This supports the existence of probable cause to believe that unregistered firearms remained in defendant's residence at the time the warrant was issued. Therefore, the Court concludes that the Curran affidavit would at least be sufficient to "create disagreement among thoughtful and competent judges as to the existence of probable cause," and as such, the ATF agents' reliance on the warrant was objectively reasonable. *Fowlie,* 24 F.3d at 1067.

Finally, the Court concludes that the magistrate judge issuing the warrant was not "misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard for the truth." *Leon,* 468 U.S. at 923. Defendant's contention in his reply brief that the magistrate judge was misled is based upon the theory that the Curran affidavit could be interpreted as stating that defendant received shipments of fully assembled firearms, rather than parts kits. In support of this contention, defendant has cited statements in the Curran affidavit that "'parts kits' as sold are complete firearms, capable of firing automatic *when assembled*" (emphasis added) and that defendant "received several shipment's" totaling twelve (12) Uzi Machineguns." *See* Reply at 7. The Court concludes that defendant has not shown that Curran made such statements in "reckless disregard for the truth" or even that the statements were false. As to the first statement that "'parts kits' as sold are complete firearms," defendant asserts in his reply that "[t]o create a gun from these materials, additional parts and tools would be required," however, defendant does not specify what additional parts would be required, or whether such parts are *de minimus* bolts or screws. *See*

Reply at 3. In addition, Curran's statement was qualified by the phrase that the firearms were "capable of firing automatic when assembled." Curran Affidavit ¶ 4(g). As to the statement that defendant received shipments totaling twelve Uzi machineguns, read in the context of the remainder of the Curran affidavit, the most reasonable interpretation of the statement would be that defendant had received shipments of parts kits which could be used to assemble twelve machineguns. Because the Court concludes that the Curran affidavit did not contain false information that the affiant "would have known was false except for his reckless disregard for the truth," the ATF agents' good faith reliance on the warrant cannot be rejected pursuant to the "false affidavit" exception to good faith reliance carved out by *Leon,* 468 US, at 923.

The ATF agents executing the warrant relied in good faith upon the issuance of the warrant and therefore defendant's motion to quash the search warrant and set aside the indictment must be denied.

III. CONCLUSION

Defendant's motion to quash the search warrant and set aside indictment is: hereby DENIED.

IT IS SO ORDERED.

Date: August 23, 2004

/s/ Christina A. Snyder
CHRISTINA A. SNYDER
United States District Judge

APPENDIX 3

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re: WALTER C. MORGAN. --- WALTER C. MORGAN, Petitioner, v. UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, Respondent, UNITED STATES OF AMERICA, Real Party in Interest.	No. 04-76721 D.C. No. CR-03-00837-CAS Central District of California, Los Angeles ORDER (Filed Mar. 17, 2005)

Before: FERNANDEZ, GRABER and GOULD, Circuit Judges

The motion for reconsideration of this court's February 14, 2005 order is denied. *See* 9th Cir. R. 27-10.

No further filings shall be accepted in this closed docket.